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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No.

IRVING GREENBERG, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

IRVING GREENBERG, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 15, 1951.

OPINIONS BELOW.

The opinion of the court of appeals on the first appeal (R. 234-241) is reported at 187 F. 2d 35. The *per curiam* order of this Court granting certiorari and vacating the judgment is reported at 341 U. S. 944. The opinion of the court of appeals after remand (R. 245-248) has not yet been reported.

JURISDICTION.

The judgment of the court of appeals was entered on November 15, 1951 (R. 248). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED.

1. Whether the court of appeals properly applied to this case the rationale of *Hoffman* v. *United States*, 341 U. S. 479, *viz.*, that the privilege against self-incrimination extends to questions the answers to which would furnish a link in the chain of evidence needed to convict the petitioner of a federal crime, as it was directed to do in the mandate of this Court.

2. Whether a witness can properly be convicted of refusing to answer questions the answers to which he claims would tend to incriminate him, where he subpoenas the prosecutor's files and seeks to examine the minutes of the Grand Jury to show that his answers would in fact incriminate him, but he is not permitted to obtain the records so subpoenaed and sought to be examined.

3. Whether, where the record shows a general finding of guilty on all charges, but the formal judgment and commitment varies that finding in numerous material respects, a court of appeals may dispose of the appeal on the basis of the later formal judgment and commitment instead of on the basis of the actual proceedings at the trial.

4. Whether it is proper to try a defendant in a criminal case on one theory, for commission of one offense, and then to affirm his conviction on the theory that he has committed a different offense.

5. Whether a defendant may be convicted of disobedience of an order of a court where there is no showing in the record that he was ever given any specific order by the court.

CONSTITUTIONAL PROVISION AND STATUTES AND REGULATIONS INVOLVED.

The Constitutional and statutory provisions and regulations involved are set forth below in the Appendix, *infra*, pp. 26-30.

STATEMENT.

On September 14, 1950, the Grand Jury of the United States for the Eastern District of Pennsylvania undertook an inquiry involving, *inter alia*, violations of the internal revenue and other criminal laws of the United States, and conspiracy to commit those offenses (R. 2a). On October 2, petitioner was subpoenaed to appear as a witness before said Grand Jury, at which time he refused to answer certain questions propounded to him, on the ground that the answers thereto would tend to incriminate him (R. 2a).

Thereupon, on October 9, petitioner's refusal to answer specified questions, including a question as to whether he was in the numbers business, was brought to the attention of the district court by the special prosecutor, one Goldschein (R. 203-204). Extensive hearings then followed on petitioner's claim of privilege, on October 9, 17-20, 23, 30, and 31.*

The first question to which the prosecutor sought an answer was whether petitioner was in the numbers business. Also sought to be answered were questions as to the identity of certain numbers writers at his place of business known to petitioner, and in particular, whether petitioner had ever met, *inter alia*, Willie Weisberg and Cappy Hoff-

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* The proceedings appear in this record in the following order: *October 9:* R. 203-205; R. 71a-95a; R. 215-216; R. 95a-99a. *October 17:* R. 99a-102a. *October 18:* R. 102a-109a. *October 19:* R. 109a-112a. *October 20:* R. 112a-115a; R. 205-207; R. 115a-117a; R. 216-220; R. 117a-118a; R. 220-222; R. 207-209; R. 222-223; R. 118a-119a; R. 211a; R. 119a-120a; R. 209; R. 223-230; R. 120a-121a. *October 23:* R. 121a-143a; R. 209 (last line)-212; R. 143a-145a. *October 30:* R. 230-233; R. 145a-148a. *October 31:* R. 149a-156a.

man there.[1] Petitioner was also asked what business he used his telephone for, this after he had answered that he did not use it for any lawful business.[2] It was contended on petitioner's behalf that the questions propounded, though on their face innocent, or in any event not on their face criminating as to federal law, would none the less supply links in a chain of evidence showing the commission of federal offenses, particularly under provisions of the Internal Revenue Code (*infra*, pp. 26-29), which require the keeping of books and records and penalize the failure to withhold pay of employees subject to federal income tax and to make social security payments, and also under those provisions which prohibit the making of a return which the taxpayer does not believe true as to every material matter.

The district judge inclined to the view that the incriminating nature *vel non* of the questions propounded, in the light of these provisions, turned on whether or not there were employees in the numbers business (R. 119a, 223-224). Meanwhile, in order to show the incriminating nature of the questions at issue, petitioner's counsel subpoenaed the prosecutor Goldschein to bring with him all his records concerning petitioner (R. 99a-100a, 110a-111a), and sought to examine the Grand Jury minutes pertaining to petitioner (R. 148a).

On October 23, petitioner testified that he refused to answer the questions because the answers would incriminate him under the internal revenue laws; that he stated in his 1949 income tax return that he was engaged in a

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[1] See R. 3a, 204. "Willie Weisberg" appears to be the "William Weisberg" about whose whereabouts the petitioner in *Hoffman* v. *United States*, 341 U. S. 479, 481, 488-489, was interrogated; and "Cappy Hoffman" was the petitioner Samuel Hoffman involved in that case. See R. 11-14, No. 513, Oct T. 1950.

[2] This was the substance of the questions around which the discussions in the district court revolved; the exact form of the unanswered questions which were later the subject of the presentment are set forth below, p. 7, *infra*.

certain business[3] and listed other income under "Miscellaneous"; and that his apprehension that his answers to the questions would tend to incriminate him was based on what he had read in the newspapers, his counsel's advice, and his own knowledge of what his answers would be (R. 130-132). He was not cross-examined on his testimony. His counsel, Morton Witkin, Esq., then testified that, after discussing the matter with petitioner, it was his opinion that answers to the questions involved would be incriminating (R. 143a). Mr. Witkin was not cross-examined either (R. 210). Again the court emphasized the fact that petitioner had not admitted that he did not keep any books or records or that he had not withheld withholding taxes (R. 134a, 135a, 136a, 137a).

On October 30, the proceeding resumed (R. 230), apparently after petitioner, having appeared again before the Grand Jury and having admitted that he knew numbers writers, had refused to answer the question *Who?* (R. 3a-6a). The district judge then said (R. 231),

> I don't see here where there is any direct tendency to incriminate him. It may involve numbers writers, but I won't bridge that gap. I am directing him to answer who they are. * * * the question just is, does he know them. He doesn't say that he is associated with them.

There is no showing whatever in the record that petitioner was in court on this occasion.

The colloquy between court and counsel continued (R. 231-233), and then the district judge said (R. 145a-146a):

> THE COURT: I am getting to that.
> These repeated refusals to answer concern itself with the basic question "Are you in the numbers business?" I think that the continued getting around it in various or different variations with respect to it, since

[3] This referred to his real estate business and not the business to which the questions were directed. See R. 131a-132a, 218.

counsel have chosen to make their stand, I think they ought to go up on the question "Are you in the numbers business?" I don't understand the Government's position. Is it that you think eventually you are going to get the answer, Mr. Goldschein?

MR. GOLDSCHEIN: Yes.

THE COURT: Don't you think we would be better off to get a ruling from the Circuit Court as to that main question rather than side issues? I don't mean by that in anywise to say that it isn't pertinent and necessary, but aren't we just getting around, if he refuses to answer that he is in the numbers business, you have the unlawful business specifically decided, and the Court will decide. *Why don't you go up on the main issue as to whether or not he is in the numbers business?* [Italics added.]

The judge further said (R. 146a), "I am going to rule here, that these questions have to be answered, * * *."

Thereupon petitioner's counsel again sought a ruling on his subpoena *duces tecum* seeking the prosecutor's papers (*supra*, p. 4), and on the latter's motion to quash that subpoena (R. 146a-149a); the district judge ruled that (R. 150a)—

with respect to that motion for the production of the documentary evidence, on the record as it now is it will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate.

And again (R. 151a, 152a)—

Until you make some showing you will not see those records.

* * * * * * * *

The next one is "Irving Greenberg by his counsel again requests the Court to allow him the minutes of the Grand Jury to show the questions asked of Irving Greenberg would tend to incriminate him."

I deny that motion.

Thereafter, on November 1, the Grand Jury made formal presentment (R. 157a) that petitioner had refused to answer particular questions. It was pointed out that petitioner's reasons for his refusal to answer did not appear in the presentment (R. 158a-165a), whereupon the district judge ruled that the presentment should be amended to include such answers as petitioner actually gave before the Grand Jury (R. 165a-169a). After a recess, the Grand Jury returned with an amended presentment (R. 170a, 2a-9a), which was further amended, on motion, to include petitioner's answers in full by incorporating the same by reference (R. 173a-180a). Two days later, on November 3, petitioner was tried on the presentment as thus amended.[4]

The presentment alleged petitioner's refusal to answer four questions, on the ground that the answers would tend to incriminate him: (1) *Are you in the numbers business now?* (R. 4a). (2) *Who?*, being the question asked after he had answered that he knew men around a specified address who were in the numbers business (R. 5a-6a). (3) *Do you use it for any other business?* and (4) *What business do you use it for?*, after he had answered that he did not use his telephone for any lawful business R. 6a).[5]

The presentment then alleged that petitioner (a) by his refusal to answer the questions propounded to him had thwarted the Grand Jury's investigation and obstructed the administration of justice, and that (b) he had disobeyed the orders of the court to answer before the Grand

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[4] In the presentment as printed in the record (R. 2a-9a), these additional answers in full which were added at the direction of the court (R. 173a-179a) have not been included.

[5] The district judge was persuaded by petitioner's counsel that only three questions remained unanswered (R. 13a-14a). But since the court of appeals assumed that there were two unanswered questions dealing with petitioner's telephone (R. 236, 238), and since the issues now presented are not thereby varied, we are accepting the court of appeals' assumption for purposes of this petition.

Jury the aforesaid questions (R. 8a).[6] The presentment prayed that the court invoke its punitive power against petitioner (R. 8a-9a)—

> to preserve the authority and vindicate the dignity of the Court in order to maintain the proper functioning of the Court and the Grand Jury, and that this Honorable Court exercise its authority so that its power to punish may serve as a deterrent to other recalcitrant witnesses, who may be inclined to obstruct the business of this Grand Jury.

At the trial, petitioner was brought to the bar of the court (R. 10a), and the four questions above set out were read to him (R. 10a-13a). In answer to a question by the court, petitioner admitted that he had refused to answer those questions before the Grand Jury (R. 13a).[7] Thereupon the district judge said (R. 14a):

> Now, you say those are the questions you were asked in the Grand Jury room?
>
> The burden here shifts to the defendant. What is your wish here, gentlemen?

Whereupon petitioner's counsel elected to proceed with the trial.[8]

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[6] As the court of appeals pointed out (R. 235), "Charge (a) involved a violation of clause (1) of Sec. 401 of title 18, United States Code, and charge (b) involved a violation of clause (3) of that section." The text of the statutory provisions is set out in the Appendix, *infra*, p. 26.

[7] No point is made here that requiring petitioner to answer the court's question obviously compelled him to testify against himself in a criminal case.

[8] This procedure followed that previously outlined by the district judge (R. 182a): "I am going to call him to the bar of the Court and I am going to ask him whether he refused to answer these questions before the Grand Jury and give him an opportunity to answer them now, and then I will give you an opportunity, if you so wish, to offer evidence to us or go forward, if you will, to show that these questions, he does have reasonable ground for the apprehension of danger."

At the trial, petitioner directed the court's attention to the pertinent provisions of the Internal Revenue Code and the regulations thereunder pertaining to withholding taxes on employees, on social security taxes, and on the requirement for keeping records and making accurate returns (R. 15a-18a; *infra*, pp. 26-30. Petitioner introduced in evidence the relevant portions of the earlier hearings (R. 14a-15a, 71a-195a). Next, petitioner adduced the testimony of a recognized tax expert (R. 19a) to show that, if petitioner during 1950 was engaged in an unlawful business or in the numbers business, and such business required employees, then petitioner would be obliged to file returns under the Internal Revenue laws (R. 19a-26a).

It was also shown that the numbers business involved employees and that petitioner had so testified before the Grand Jury in answer to questions asked by the prosecutor (R. 25a-26a).

After a representative of the Collector of Internal Revenue had refused because of departmental regulations to honor a subpoena requiring the production of petitioner's withholding tax returns (R. 30a-36a), and had been sustained by the court in such refusal (R. 35a, 36a)[9] petitioner testified that he did not file any withholding returns during 1950 (R. 37a).

Petitioner's counsel, Mr. Witkin, was permitted to incorporate by reference (R. 57a) his testimony at the preliminary hearings that "It is my honest, sincere and legal opinion that were Mr. Greenberg to answer the questions which were propounded to him that he would be incriminating himself" (R. 143a).

Petitioner then called as his next witness the prosecutor Goldschein, who was in charge of the Grand Jury investigation, to show, *inter alia*, that petitioner was being investigated by the Grand Jury and by the Govern-

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[9] "THE COURT: • • • Let Greenberg take the stand if he didn't file. I won't compel the Government to do that. If they don't want to do it, I certainly will not tell them to." (R. 35a.)

ment (R. 49a) and that the prosecutor's file contained proof of petitioner's precise unlawful business (R. 49a). Petitioner's counsel offered to prove not only the foregoing, but also that other witnesses before the Grand Jury were asked questions regarding petitioner; that petitioner himself was under investigation; that it was part of the plan of the prosecution to show that petitioner was guilty of violating the internal revenue laws; and that upon petitioner's answering the questions now involved, he would forthwith be prosecuted (R. 48a-52a). Objection to this offer of proof was sustained (R. 53a). Petitioner then introduced newspaper clippings to document his contention (R. 132a, 176a) that his "fear and apprehension that I would tend to incriminate myself" was based in part on "that which I have read in the newspapers." These newspaper articles (Def. Ex. I, R. 56a, 196a-197a) quoted the Department of Justice spokesman as saying that "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws," and, further, "Goldschein himself stressed the importance of 'conspiracy' which, the other spokesman said, might lead to tieups between police and politicians and underworld characters."

The district judge did not permit petitioner's counsel to examine the records and documents in the prosecutor's possession which they sought for the purpose of showing the incriminating nature of the unanswered questions (R. 53a-54a), nor did he examine them himself. He refused permission to examine the Grand Jury minutes (R. 53a-54a), and he reserved decision on the motion with respect to quashing the subpoena *duces tecum* (*supra*, pp. 4, 6) "until proper showing is made" (R. 53a).

After both sides had rested, the judge reserved decision on the case (R. 64a). When the proceedings were resumed, on November 8, petitioner was called to the bar of the Court, and the district judge said (R. 65a):

> I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't I am ready to impose sentence. Do you want to answer?

Petitioner's counsel said, "We take the same position we have taken before, may it please Your Honor." Thereafter, after listening to argument on the sentence (R. 65a-71a), the district judge sentenced petitioner to five months' imprisonment, and admitted him to bail in the amount of $10,000 pending appeal (R. 71a). An appeal was taken on the same day (R. 1a).

Two days later, on November 10, the district judge signed a formal judgment and commitment (R. 198a-201a), which differed in several material respects from the earlier oral finding of guilty. (1) The formal judgment omitted all mention of the first unanswered question set out in the presentment, viz., *Are you in the numbers business now?* (2) The formal judgment reflected a finding of guilty as to only one of the charges made in the presentment, viz., disobedience of an order of the court and said nothing as to the other charge, viz., obstruction of justice. (3) There was a variance between the recital in the formal judgment as to what happened on November 8, and the stenographic record of that day's proceedings.[10]

On appeal, the court below affirmed petitioner's conviction, on the view that there was no finding that petitioner's refusal to answer the first question was a contempt, that the district court had held him in contempt only for disobeying its order to answer the remaining questions, and that there was no finding that petitioner obstructed justice by refusing to answer questions before the Grand Jury (R. 234-241); the court therefore said (R. 236):

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[10] Since this last point might conceivably be regarded as argumentative, the details are set forth below, pp. 19-21.

> Accordingly we do not have to consider whether the appellant, in claiming his constitutional privilege under advice of counsel, as he did, could be convicted of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury. Certainly the assertion of a constitutional right if made in good faith on advice of counsel could hardly be described as such misbehavior.

Petitioner thereupon petitioned for a writ of certiorari, which was granted, this Court saying *per curiam* (341 U. S. 944), "The judgment of the Court of Appeals is vacated and the case is remanded to that court for reconsideration in the light of *Hoffman* v. *United States,* 341 U. S. 479."

After reargument, the court below adhered to its previous ruling and reaffirmed the judgment of conviction, being "satisfied that our prior decision was right, that the ruling in the Hoffman case has not impaired it, and that it should stand" (R. 245). The court of appeals held that there was no contention that the mere disclosure of petitioner's business would tend to criminate him of a federal crime, and that the questions asked of petitioner as to the names of numbers writers whom he had testified that he knew at his place of business were not involved in the *Hoffman* case.

REASONS FOR GRANTING THE WRIT.

This case is here for the second time because of the unwillingness or inability of the court below to give full and ungrudging effect to the command of the Fifth Amendment that "No person * * * shall be compelled in any criminal case to be a witness against himself," and because that court, which was directed to reconsider this case in the light of the subsequently announced decision in *Hoffman* v. *United States,* 341 U. S. 479 (in which its own judgment was reversed), either ignored or misap-

plied that ruling, preferring its own substantially narrower reading of the constitutional privilege.

Moreover, a most shocking feature of this case still permeates the entire proceeding: The United States has prosecuted and convicted petitioner while simultaneously denying him the ability to defend; it has successfully contended that he was guilty of contempt in refusing to answer questions, claimed by him to be self-incriminating, and yet was permitted to assert its privilege when he sought to obtain records in its possession which would have substantiated his claim.

1. The first question raised in the present posture of this case is that the court of appeals did not heed the mandate of this Court to give effect to the decision in *Hoffman* v. *United States*, 341 U. S. 479, as to the scope of the privilege against self-incrimination.

a. One phase of that problem turns on petitioner's refusal to state what his business was, in connection with the questions (1) *Are you in the numbers business now?;* and, after he had answered that he did not use his telephone for any lawful business, (3) *Do you use it for any other business?* and (4) *What business do you use it for?*

In its second opinion the court below said that "There is in the record no suggestion that Greenberg might be engaged in a business which violates the federal law" (R. 246-247), and pointed out that "everything in the record suggests that the unlawful business in which he might be engaged is the so-called 'numbers' business, an activity proscribed by Pennsylvania law and to which his constitutional immunity does not extend" (R. 247).[11]

[11] The reliance by the court of appeals in both opinions (R. 237, 238, 247) on its decision in *Camarota* v. *United States*, 111 F. 2d 243, certiorari denied, 311 U. S. 651, is assuredly misplaced, for there the prosecutor told the court that he was not seeking an indictment, nor trying to determine what the witness's income was (R. 57, No. 135, Oct. T. 1940), nor what the witness's business was, since that was revealed by his income tax return (*id.*, at R. 33). The present case, obviously, is wholly different.

This conclusion not only wholly disregards this Court's ruling in the *Hoffman* case, and reverts to the earlier and narrower doctrine of the court below laid down in that case before reversal, 185 F. 2d 617, but also overlooks the connection between this petitioner and Hoffman, and between this petitioner and the Weisberg concerned in *Hoffman's* case—a connection which appears in the opening paragraphs of the Grand Jury's presentment (R. 3a).

This Court in *Hoffman* specifically said (341 U. S. at 486-487):

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. * * * To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result.

Here, petitioner showed that he had not filed any social security or withholding tax returns (R. 37a). He showed that such returns would have been required as a matter of federal law, if while engaged in a business unlawful under state law, he had any employees in such business (R. 19a-26a). He showed that the nature of the numbers business was such that it required employees (R. 25a-26a). He stated that he had used his telephone "not for any lawful business" (R. 8a). And he showed that the prosecutor had announced in the public press an intention to strike at "numbers, slot machines and other rackets * * * through the Federal revenue and conspiracy laws" (R. 196a) "even though there are no Federal laws regarding numbers" (*ibid.*), and that his own fear of self-incrimination

was based in part on what he had read in the newspapers (R. 56a, 132a, 176a).[12]

Moreover, if petitioner testified to being engaged in any business, whether lawful under both state and federal law, or unlawful under either, that fact would be relevant to prove that he had previously been engaged in that business. See *Johnson* v. *United States*, 318 U. S. 189, 195-196. If, therefore, the proceeds of that business had not been reflected in his records or returns, he could not possibly answer any question relating to that business without incriminating himself under Sections 145(c) or 3809(a) of the Internal Revenue Code, *infra*, p. 27, regardless of the nature of that business. And, significantly, this grand jury was investigating violations of the internal revenue laws (R. 2a), and the prosecutor had announced that he was striking at "numbers * * * and other rackets * * * through the federal revenue and conspiracy laws" (R. 196a, 197a).

In those circumstances, we submit, he had shown enough to indicate that he was in danger without going on to testify that in fact he himself had employees in his ventures, or that he himself was in the numbers business or concerning the unlawful business for which he used his telephone. The answers to such questions were the critical links in the

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[12] Even the court below agrees that, if such newspaper articles are introduced at the trial, they are competent "to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy." *United States* v. *Hoffman*, 185 F. 2d 617, 621. *Accord: United States* v. *Weisman*, 111 F. 2d 260, 262 (C. C. A. 2).

In the present case the court below reaffirmed its ruling as to newspapers, made in *Hoffman*, but went on to say (R. 239) that here "appellant made no such showing." Apparently a newspaper reference to a witness as an underworld figure is sufficient in the view of the court below to establish a fear of possible self-incrimination (*Hoffman*), while a similar reference to the prosecutor's plan to strike indirectly at violators of state laws through the federal tax and conspiracy laws is insufficient (the present case).

And see R. 3a, 223, and p. 17, *infra*, for the prosecutor's attempt to link this petitioner with Hoffman.

chain; affirmative answers would have been admissions of guilt. In any event, petitioner had shown enough to be justified in believing that he was in a precarious position. Accordingly, we submit further, he was justified in refusing to answer the questions above-noted, which might lead to the discovery of evidence linking him with a violation of federal law or with a federal conspiracy, even though the answer to the particular question might not by itself incriminate him federally. That, assuredly, is the rationale of the *Hoffman* decision in this Court. Consequently the holding of the court below (R. 247), that "In the absence of any contention on Greenberg's part that the mere disclosure of his business, as such, may tend to incriminate him of a federal crime we regard the ruling of the Supreme Court in Hoffman's case as wholly inapplicable," amounts in substance to a refusal to apply the law laid down by this Court.

Moreover, the quoted passage reflects a thoroughgoing unfamiliarity with the record in this case. For the very terms of the Grand Jury's presentment showed that petitioner specifically and explicitly refused to answer the question *Are you in the numbers business* now? "because the answer I would give you will tend to incriminate me of a violation of the Federal Criminal Statutes" (R. 4a). Additionally, as we have shown, *supra*, pp. 5, 9, petitioner's attorney and his accountant testified that the disclosure of his business would incriminate him under federal law, and he attempted to examine the Grand Jury minutes and to question the prosecutor, all in an effort to prove the incriminating tendency of the inquiries. Obviously, therefore, the result of the second opinion is that, in the Third Circuit, nothing less than clear admission of guilt under federal law is a sufficient foundation for the exercise of the constitutional privilege. Thus this Court's *Hoffman* decision has been nullified, and this Court's mandate herein has been wholly ignored.

b. Another phase of the scope of privilege against self-incrimination is involved in petitioner's refusal to name

numbers writers of his acquaintance around his place of business (R. 5a-6a). As to this the court below in its second opinion simply says (R. 247), "The Hoffman case did not involve questions of this sort and the ruling in that case is not applicable to them." But the *Hoffman* case upheld that petitioner's refusal to answer, on grounds of self-incrimination, questions regarding his acquaintance with one William Weisberg. See 341 U. S. at 488-489 for language fully applicable to this phase of the present case. And a similar claim of privilege was upheld by this Court in *Patricia Blau* v. *United States*, 340 U. S. 159, where the witness was asked whether she knew the names of officers of the Communist Party. Moreover, the presentment in this case (R. 3a) shows the prosecutor's attempt to link this petitioner both with Cappy Hoffman, the protagonist of *Hoffman* v. *United States*, 341 U. S. 479, see R. 11-14, No. 513, Oct. T. 1950, who had a criminal record extending over 20 years (341 U. S. at 489), and with Willie Weisberg, who assuredly is the same individual—and fugitive from justice, 341 U. S. at 488—about whom Hoffman was questioned. This identity was well within the realm of judicial notice. See *United States* v. *Pink*, 315 U. S. 203, 216, and cases there cited. Thus not only the rationale of the *Hoffman* case but also its very characters appear in this case. We submit that both elements imperatively require reversal of the Third Circuit's reaffirmed judgment of conviction under the present heading.[13]

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[13] If it were necessary to rely on a conflict between circuits, we could point to *Alexander* v. *United States*, 181 F. 2d 480 (C. A. 9); *Estes* v. *Potter*, 183 F. 2d 865 (C. A. 5), certiorari denied, 340 U. S. 920; and *Healey* v. *United States*, 186 F. 2d 164 (C. A. 9), in each of which a witness's refusal to answer questions similar to those asked Patricia Blau was sustained. As the court in the *Healey* case said (186 F. 2d at 168), "what a lead to the Federal Bureau of Investigation to investigate the details of the relationship" an affirmative answer would give. But it seems to us sufficient for present purposes to rest on the disregard by the court below of the *Blau* and *Hoffman* rulings of this Court.

2. We turn now to the questions in this case involving the court of appeals' misreading of the record, and we do so at this juncture, not because of their relative importance, but because they assist in clarifying the remaining points.

As the court below properly noted (R. 235) that the presentment charged both a violation of 18 U. S. C. 301(1) —refusal to answer four questions before the Grand Jury —and of 18 U. S. C. 401(3), deliberate disobedience of an order of the district court to answer those same four questions. See R. 8a. After the trial, the judge made a general finding of guilty (R. 65a). Two days thereafter, he signed a formal judgment and commitment which varied that general finding, first, in that it found petitioner guilty only of refusing to answer the last three questions, omitting any finding as to the unanswered query, *Are you in the numbers business now?;* and second, in that it found petitioner guilty only of deliberate disobedience of the lawful order of the court, omitting any reference to petitioner's alleged obstruction of justice by failing to answer questions before the Grand Jury (R. 199a-201a).

In its first opinion, the court of appeals dealt with the case on the basis of the recitals in the November 10 judgment, not on the basis of the general finding of guilty made in open court two days earlier (R. 236). This treatment enabled the court below expressly to pass over, as it then did, two questions: (1) the alleged incriminatory character of the question *Are you in the numbers business now?* (R. 236); (2) whether petitioner "in claiming his constitutional privilege under advice of counsel, as he did, could be convinced of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury" (R. 236).

However, in its second opinion, the court of appeals considered—and held non-incriminatory—the question *Are you in the numbers business now?* The court had said in its first opinion that "it appears from the record that this

problem is not before us,'"[14] but the second opinion does not discuss or explain why or how that problem thereafter could have come before it. Clearly this Court's mandate did not of its own force enlarge the matters which were to be reconsidered on the remand.

Of course the rule is well settled that it is the judgment pronounced in court and not the later formal commitment, which controls; to the extent that the latter varies from what was said in court, it is utterly void. *Hill* v. *United States*, 298 U. S. 460; *Watkins* v. *Merry*, 106 F. 2d 360, (C. C. A. 10). If the court below had in fact looked to the record in obedience to that rule, it would also have been obliged to consider the finding of guilty in respect of refusal to answer questions before the grand jury. But it wholly failed to consider on the reargument after remand the question which arose on that footing, nor did it revert to its earlier comment, *viz.*, that (R. 236) "Certainly the assertion of a constitutional right if made in good faith on advice of counsel could hardly be described as such misconduct," i. e., obstructing the administration of justice.

The second opinion assuredly does not spell out a more accurate reading of the record, however much it may reflect a more compelling zeal to reaffirm petitioner's conviction.

3. In both opinions, the court of appeals rested its affirmance of petitioner's conviction on the basis of the disobedience by him of an order of the district court. But the record shows neither proof of any order by the district court, nor of any disobedience of such an order.

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[14] "However, it appears from the record that this problem is not before us since the district court based the finding of contempt solely upon the appellant's refusal to answer the second and third groups of questions above mentioned and did not find that the appellant's refusal to answer this first question was a contempt of the court's order. We, therefore, do not here consider its alleged incriminatory character." R. 236.

The court of appeals said in its first opinion (R. 236) that petitioner "admitted at his trial that he had disobeyed the order of the district court by refusing to answer before the grand jury the questions which the court had ordered him to answer * * *." No such admission appears in this record. Petitioner admitted only that he had refused to answer the questions set out in the presentment (R. 13a; cf. R. 14a, lines 3-4). He admitted nothing as to any order of the court; obviously the mere recitals in the presentment as to such an order are no more evidence against him than similar recitals in an indictment would be; and the record is devoid of any proof of any such orders.

Only two rulings by the district court bearing on directions to answer appear in the record, and neither is shown to have been made in petitioner's presence (R. 231, 146a; *supra*, pp. 5-6). And there is a glaring variance between what actually occurred when sentence was pronounced, and what is recited in the later judgment and commitment concerning those occurrences:

Record (R. 65a)	Judgment and Commitment (R. 201a)
[November 8, 1950]	[November 10, 1950]
The Court: * * * I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't, I am ready to impose sentence. Do you want to answer?	* * * that on the 8th day of November in the year 1950 this Court gave the said witness, Irving Greenberg, another opportunity to answer the said questions and he, through his counsel, stated in open court *that he would not obey the Order of the Court and answer the question which the Court directed him to answer* as hereinabove set forth, thereby thwarting the investigation of the said Grand Jury and obstructing the administration of justice. [Italics added.]
Mr. Witkin: We take the same position we have taken before, may it please Your Honor. * * *	

In other words, while actually petitioner simply declined the proffered opportunity to purge himself of the contempt adjudged against him for refusal to answer questions before the Grand Jury, the recital in the subsequent judgment makes him appear to be "willfully, deliberately and contumaciously" disobeying and resisting a lawful order of the district court. And the court below affirmed the judgment of conviction on both occasions on the latter footing.

Obviously, therefore, petitioner here stands convicted of something which he is not shown to have done. The rulings in his absence (R. 231, 146a) do not amount to direct orders disobedience of which entails the penalties of contempt of court. *Morgan* v. *United States*, 95 F. 2d 830 (C. C. A. 8); *Berry* v. *Midtown Service Corporation*, 104 F. 2d 107 (C. C. A. 2). There simply is no proof here of any order, hence there can be none of disobedience of any order.

This failure of proof, it may fairly be remarked, is a consequence of the fact that whereas the sole emphasis at the trial was on petitioner's alleged violation of 18 U. S. C. 401(1), the gravamen of the formal judgment and commitment and of its affirmance on appeal was his violation of 18 U. S. C. 401(3). This circumstance would accordingly in any event involve a deprivation of due process of law, see *Cole* v. *Arkansas*, 333 U. S. 196, though the principle of the *Cole* case was early established: "The rule that a man shall not be charged with one crime and convicted of another" was long ago applied by this Court, in Chief Justice Marshall's time. *Schooner Hoppet* v. *United States*, 7 Cranch 389, 394.

4. Finally, we come to a very grave aspect of this case, perhaps even more serious than the court of appeals' disregard of this Court's mandate—the circumstance that petitioner was prosecuted while being denied opportunity to present evidence in his defense. This question arises under both charges of the presentment.

a. Obstruction of justice, 18 U. S. C. 401(1). To the extent that the questions asked did not on their face appear to call for answers which would tend to incriminate petitioner, it was incumbent upon him to establish their incriminating character (*United States* v. *Rosen*, 174 F. 2d 187, 188 (C. A. 2), certiorari denied, 338 U. S. 851, and cases there cited), and the district judge therefore properly ruled that the burden shifted to the petitioner once his refusal to answer had been established (R. 14a).

To meet this burden, petitioner sought to show that he had been placed in fear of incrimination by newspaper reports of the prosecutor's announced plan to strike indirectly at numbers activities, which do not involve federal offenses, through the federal revenue and conspiracy laws (R. 196a-197a), and, by subpoenaing the prosecutor and his papers and by attempting to examine the Grand Jury minutes, to show that the answers to the questions asked petitioner before the Grand Jury would supply the links in a chain of evidence which would show his commission of federal offenses (R. 45a-54a). Except for the newspapers, which were admitted for a limited purpose (R. 56a), petitioner was not permitted to make this showing (R. 35a, 53a-54a; *supra*, pp. 9-10).

This, we submit, was clearly error: It amounted to prosecuting petitioner while simultaneously denying him the right to defend. The reasoning of the court below, sanctioning this course, is, we submit with deference, impossible to follow.[15] But, in any event, the ruling of the court

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[15] R. 238-239: "It is not necessary, of course, for the witness to prove that his answer would actually be incriminating, for to do so would be to lose the privilege in establishing it. Accordingly he need not prove that the government has in its possession or that the grand jury has secured from him or from other witnesses evidence which, when the answer to the question under attack is added, will be sufficient to complete the chain of evidence needed to convict him of federal crime. Here, as we shall see, the court was justified in concluding that a direct answer could not reasonably form a link in that chain. Accordingly the court did not err

below is squarely in conflict with that of the Second Circuit in *United States* v. *Zwillman*, 108 F. 2d 802, where a conviction had in identical circumstances was reversed. Judge A. N. Hand there said (108 F. 2d at 803-804):

> It is true that the government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby deprived him of his right to a proper trial where he could offer evidence in his defense.

The *Zwillman* ruling is simply an application of the broader principle that, when the United States institutes criminal proceedings in which evidence otherwise privi-

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in refusing appellant access to the grand jury minutes and to the files of the goverment.* Where, as here, the question was innocent on its face all that the appellant was required to do was to satisfy the court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of a federal crime if a fact which might be disclosed by a direct answer to the controverted question were added to them."

* [Footnote in original] "We, of course, do not decide whether these contentions of the appellant would have been meritorious in connection with the charge contained in the presentment that he had contumaciously obstructed the administration of justice by blocking the inquiry being made by the grand jury, since the district court did not, as we have pointed out, convict him on this charge. That question may well involve other considerations."

As we have pointed out above, p. 18, the district court did convict petitioner of that charge also.

leged becomes importantly relevant, it abandons the privilege. *United States* v. *Andolschek*, 142 F. 2d 503 (C. C. A. 2); *United States* v. *Beekman*, 155 F. 2d 580 (C. C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. C. A. 2); cf. *Edwards* v. *United States*, 312 U. S. 473, 481.[16]

The gist of petitioner's contention with specific respect to grand jury minutes has been but recently stated by Chief Judge Swan for the Second Circuit in *United States* v. *Remington*, 191 F. 2d 246, 250, pending on certiorari, No. 387, this Term:

> It is one thing to deny the defense access to grand jury minutes which it intends to use for the relatively negative purpose of impeaching a witness; it is quite a different thing to deny an accused access to the minutes of his own testimony which may afford him an affirmative defense.

Here petitioner sought the grand jury minutes for the expressed purpose of demonstrating that his fear of incrimination was well founded. We submit that, under the cited decisions, he was entitled to have them if—and as long as—the United States chose to continue the prosecution.

b. Disobedience of court's order, 18 U. S. C. 401(3). The same result would follow if it were assumed that, at the hearings prior to the presentment, petitioner had been squarely ordered by the court to answer the questions involved. At this juncture also, petitioner called for the prosecutor's files and the minutes of the Grand Jury to show the incriminating character of the questions asked him (R. 99a-100a, 148a). The district judge's ruling that (R. 150a) "that motion for the production of the documentary evidence * * * will still be held under advisement

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[16] Wholly different considerations, of course, are involved when the privilege attaching to papers of the United States is asserted collaterally. Cf. *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462.

until and when you show by proper cause that these questions have a tendency to incriminate", and again (R. 151a), that "Until you make some showing you will not see those records," put the cart before the horse with a vengeance: It denied petitioner an opportunity to prove the incriminatory nature of the questions asked until he had first proved their incriminatory nature. Otherwise stated, the judge denied petitioner access to the evidence which he required to defend himself until he had first established his defense without that indispensable evidence.

The considerations under this heading are identical with those under the other: If petitioner was required to answer the questions by reason of 18 U. S. C. 401(1), he was required to obey the judge's order to answer them, under pain of 18 U. S. C. 401(3). By the same token, if he had a constitutional right to refuse to answer the questions before the Grand Jury, then the judge's order telling him to answer them was not lawful. In either event, petitioner could not properly be convicted when he was deprived of evidence which would show both that his refusal to answer was proper and that the judge's order that he answer was improper.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX.

Constitutional Provision and Statutes and Regulations Involved.

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

2. Section 401 of Title 18, United States Code (1948 revision), provides:

> **§ 401. Power of court**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

3. Section 145 of the Internal Revenue Code, 26 U. S. C. 145, provides:

> **§ 145. Penalties.**
>
> **(a) Failure to file returns, submit information or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to addition to other penalties provided by law, be

guilty of a misdemeanor and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution.

(c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code.

4. Section 145(c), just quoted, was repealed by Section 4(a) of the Act of August 27, 1949, c. 517, 63 Stat. 668, and the following provision of the Internal Revenue Code was enacted in its stead:

Sec. 3809. Verification of Returns; Penalties of Perjury.

(a) Penalties.—Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of purjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

5. Section 1430 of Title 26, United States Code, provides:

§ 1430. Other laws applicable

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700

[tax on pistols and revolvers; penalty in 26 U. S. C. 2707, *infra*, pp. 28-29] or section 1800 [tax on documents, etc.; penalties in 26 U. S. C. 1820-1823], and the provisions of section 3661 [enforcement of liability for taxes collected], shall, insofar as applicable and not inconsistent with the provisions of this subchapter [Employment Taxes; Employment by others than carriers], be applicable with respect to the taxes imposed by this subchapter.

6. Section 1622 of Title 26, United States Code, provides in pertinent part as follows:

§ 1622. Income tax collected at source

(a) Requirement of withholding. Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to 15 per centum of the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption as shown in subsection (b) (1).

* * * * *

7. Section 1627 of Title 26 United States Code, provides:

§ 1627. Other laws applicable

* * * * *

All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 [Employment taxes; tax on employees] shall, insofar as applicable and not inconsistent with the provisions of this subchapter [Employment Taxes; Collection of income tax at source on wages], be applicable with respect to the tax under this subchapter.

8. Section 2707 of Title 26, United States Code, incorporated by reference in 26 U. S. C. 1430, *supra*, pp. 27-28, provides in pertinent part:

§ 2707. Penalties

* * * * *

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any

records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

9. The pertinent portions of 26 C. F. R. 402, Employment Taxes, provide:

402.601 Tax and Information Returns

Every employer shall make a tax and information return on Form SS-1a for the first quarter after December 31, 1939, within which wages are paid to his employee or employees, and for each subsequent quarter (whether or not wages are paid therein) until he files a final return as required by the provisions of Section 402.603. For quarters commencing after December 31, 1949 Form 941 shall be used in lieu of Form SS-1a. One original return shall be filed with the collector. For purposes of returns under the Act, the quarters shall each be three calendar months as follows: (1) from January 1 to March 31, both dates inclusive; (2) from April 1 to June 30, both dates inclusive; (3) from July 1 to September 30, both dates inclusive; and (4) from October 1 to December 31, both dates inclusive.

405.601 RETURN AND PAYMENT OF INCOME TAX WITHHELD ON WAGES.

Except as provided in 405.602 every person required, under the provisions of section 1622, I. R. C. to deduct and withhold the tax on wages shall make a return and pay such tax on or before the last day of the month following the close of each of the quarters ended March 31, June 30, September 30, and December 31. Such return is to be made on Form W-1, Return of Income Tax withheld on Wages, and must be filed with the collector of internal revenue for the district in which is located the principal place of business or office of the employer, or if he has no principal place of business or office, then in the district in which is located his legal residence. For quarters commencing after December 31, 1949 Form 941 shall be used in lieu of Form W-1. The return on Form 941 must be filed with the collector of Internal Revenue for the district in which is located the principal place of business of the employer. * * *

402.609—RECORDS—(a) RECORDS OF EMPLOYER.

(1) Every employer liable for tax shall keep accurate records of all remuneration (Whether paid in cash or in a medium other than cash) paid to his employees after December 31, 1939. * * *

10. Section 29.54-1 of Treasury Regulations 111 provide in part as follows:

* * * The books or records required by this section shall be kept at all times available for inspection by internal revenue officers. * * *